No. 05-2939

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GELANA AMENTE,
A 77-384-633

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL.

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS
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GELANA AMENTE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 05-2939**
	)	
ALBERTO GONZALES, Attorney General	)	
	)	
Respondent.	)	
_____	)	

BRIEF FOR RESPONDENT

SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT

_____Petitioner is a native and citizen of Ethiopia, who was ordered removed from the United States as an alien present in the United States illegally. An Immigration Judge denied his request for asylum, withholding of removal, and deferral of removal under the United Nations Convention Against Torture ("CAT"). The Board of Immigration Appeals denied Petitioner's appeal, whereupon Petitioner filed a motion to reopen proceedings. The BIA denied this motion, and this decision is the subject of the instant petition for review.

The Board did not abuse its discretion in denying Petitioner's motion to reopen. The Board correctly found that Petitioner's motion did not establish that changed country conditions warranted a reversal of its prior decision.

Because the Government believes that the issues presented in this case are thoroughly addressed in the briefs, the Government does not request oral argument.

PRELIMINARY STATEMENT

Petitioner seeks review of the Board of Immigration Appeals' (Board) final order of removal, issued June 15, 2005. A.R. 2.[1] The Board's jurisdiction arose under 8 C.F.R. § 3.1(b)(3), which grants the Board jurisdiction over decisions of Immigration Judges in removal cases.

The jurisdiction of this Court arises under § 242(a) of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. § 1252(a), which provides the exclusive procedure for judicial review of all final removal orders, as amended by the REAL ID Act of 2005, H.R. 1268, 109th Cong. (2005) (enacted), Pub. L. No. 109-13, Div. B, 119 Stat. 231 ("REAL ID Act")). That section confers exclusive jurisdiction on the Court of Appeals to review final orders of deportation. See §106(d) of the REAL ID Act. Section 242(b)(1), of the Act, 8 U.S.C. § 1252(b)(1) provides that a petition for judicial review must be filed not later than thirty days

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[1] The abbreviation "A.R." followed by a number refers to a page of the Certified Administrative Record on file with this Court. The abbreviation "Pet. Br." followed by a number refers to a page of Petitioner's brief on file with this Court.

after the date of the final order of removal. In this case, the petition for review was filed on July 11, 2005. Therefore, the petition is timely.

STATEMENT OF THE ISSUE

Whether the Board abused its discretion in denying Petitioner's motion to reopen, where Petitioner sought to reopen his application for relief under the Convention Against Torture based on changed country conditions and presented no evidence of changed country conditions that would support a finding that Petitioner would be tortured if removed to Ethiopia.

STATEMENT OF THE CASE

Petitioner is a citizen of Ethiopia who entered the United States on August 17, 1993, as an exchange visitor, with permission to remain in the United States until August 31, 1999. A.R. 500. He did not depart as required, and thus the former Immigration and Naturalization Service (INS) served Petitioner with a Notice to Appear (NTA) on May 9, 2000, charging Petitioner with removal under INA § 237(a)(1)(B) as an immigrant present in the United States illegally.

At a hearing before an Immigration Judge, Petitioner requested political asylum, withholding of removal, and deferral of removal under the United Nations Convention Against Torture. The Immigration Judge denied the applications; Petitioner appealed this ruling to the Board of Immigration Appeals, and on

February 6, 2003, the Board denied the appeal without opinion. A.R. 83. Petitioner filed a timely petition for review from this decision, and on February 25, 2004, this Court denied the Petition for review in an unpublished decision. Amente v. Ashcroft, No. 03-1470 (8th Cir. 2004) (unpublished).

Nearly two years after the Board's decision, Petitioner filed a motion to reopen from this decision, and on June 15, 2005, the BIA denied the motion. A.R. 2. Petitioner timely filed a petition for review from this decision.

STATEMENT OF RELEVANT FACTS[2]

I. EVIDENCE OF RECORD[3]

Petitioner testified that he is an ethnic Oromo citizen of Ethiopia. A.R. 161-162. Prior to arriving in the United States, he was a professor at Alamya University in Ethiopia. A.R. 164. Following the collapse of the Mengistu government in 1991, Petitioner was appointed to and became chairman of the

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[2] The facts giving rise to Petitioner's first petition for review do not establish eligibility for relief, and the Court's decision in Amente v. Ashcroft, 8th Cir. No. 03-1470 is binding on this panel as a matter of *res judicata*. Because only the Board's second decision - denying Petitioner's motion to reopen - is before the Court, facts relevant to the Board's first decision are presented only insofar as they impact the Board's decision before the Court.

[3] The Immigration Judge observed that Petitioner's asylum application, affidavit, and the asylum officer's assessment of Petitioner's claim are factually consistent with his testimony. A.R. 132-134. In the interest of brevity, summaries of those documents are not repeated.

University's "Peace and Stability" committee, dedicated to maintaining order and continuity in the University following the collapse of the prior government. A.R. 165-166.

Beginning in May, 1991, Petitioner began to support the Oromo Liberation Front ("OLF"), though monetary contributions deducted from his salary. A.R. 168-169. He did not, however, become a member of the OLF. Id.

Shortly after the fall of the Mengistu government, conflicts arose between the OLF and a rival group, the Tigryan People's Liberation Front ("TPLF"). Petitioner testified that in the chaos that ensued from the fall of the government, lawlessness broke out at the University and the University asked soldiers of the TPLF to preserver order on the campus. A.R. 174. However, Petitioner testified, once order was restored, the TPLF soldiers refused to leave, which created further discord between students and the TPLF. Id. In March or April, 1992, Petitioner, along with other university officials, approached soldiers allied with the OLF and asked them to stay off campus, which they agreed to do. A.R. 187 However, Petitioner testified, this created umbrage with some of the students, who organized a protest and threw rocks at his office. A.R. 188-189.

Petitioner testified that he was detained by police on one occasion, when the Oromo People's Democratic Organization (OPDO) made complaints about the Petitioner's activities. A.R. 190. Petitioner was held overnight and released the next day, with the intervention of the University President. A.R. 191.

Petitioner testified that in April, 1992, he was removed from his position as the dean of students and as chairman of the peace and stability committee. A.R. 192. Following these events, he testified that he was frequently interrogated by university officials who inquired about his contacts with the OLF. A.R. 194-195. Petitioner also testified about an incident where someone threw something at him which he believes was a hand grenade. A.R. 196. He believes that the person who threw the grenade at him was a TPLF supporter, and that individual is no longer permitted to work at the University. A.R. 197-198.

II. THE ADMINISTRATIVE DECISIONS

A. The Immigration Judge Decision

The Immigration Judge denied Petitioner's application for asylum, withholding of removal, and deferral of removal under the CAT. A.R. 122-123. The Immigration Judge concluded that Petitioner had not suffered any past persecution in Ethiopia, observing that his single 1-day detention occurred during a period of substantial civil strife did not constitute persecution. A.R. 135-136.

Moreover, the Immigration Judge observed that while Petitioner was removed from his administrative duties as the chairman of committees, he retained his paid teaching position at the University and in fact was approved by the University president to engage in overseas study in the United States. A.R. 136. Beyond this, the Immigration Judge observed, the harassment and interrogation Petitioner experienced at the hands of university administration officials did not constitute persecution.

The Immigration Judge concluded that Petitioner had not been perceived by the University as being an active OLF supporter. The Immigration Judge reasoned that, because the university had, in 1992, sought to purge the faculty of OLF sympathizers, and Petitioner's witness Kano Banjaw was temporarily suspended from his job whereas the Petitioner himself was not, Petitioner himself could not have been perceived as an active OLF member. Id.

With respect to Petitioner's well-founded fear of future persecution, the Immigration Judge found that Petitioner did have a subjectively genuine fear of return. A.R. 137. However, the Immigration Judge found that his fear was not objectively reasonable, given the fact that Petitioner had not ever been a member of the OLF and had not shown any interest in joining the OLF in the United States. Id. "Considering all the evidence in the case, the Court cannot find that the

Respondent's own background in OLF activities is such that he would have a well-founded fear of future persecution on returning to Ethiopia." Finding that Petitioner had not met the burden of proof to establish eligibility for asylum, the Immigration Judge likewise found that Petitioner had not met his burden of proof for withholding of removal and relief under the Convention Against Torture. A.R. 138. Accordingly, the Immigration Judge denied all forms of relief but granted voluntary departure.

B. The Decisions Of The Board

The Board affirmed the Immigration Judge's decision without opinion. A.R. 83. Petitioner filed a petition for review from the Board's decision, and on February 25, 2004, this Court denied the petition for review in an unpublished decision. Amente v. Ashcroft, No. 03-1470 (unpublished). Petitioner waited two years, then filed an untimely motion to reopen the proceedings, alleging that changed country conditions made it more likely than not that he would be tortured if returned to Ethiopia. A.R. 12.

In support of this motion, Petitioner presented an article, dated April, 2004, from the American Journal of Public health which summarized the results of an epidemiology study in the Minneapolis/St. Paul area from July, 1999 until September 3, 2001. A.R. 36. The study surveyed 1134 Somalis and Oromos

living in the Minneapolis/St. Paul area. A.R. 35.[4] Half of the subjects were classified as illiterate. A.R. 36. Though the study used the UN definition of "torture" as the basis for classifying participants, id, notably absent from the report is any indication whether or what proportion of the test subjects had been granted refugee status by the U.S. government - in other words, what proportion of them had met the statutory and regulatory criteria of "torture" necessary for relief under the Convention Against Torture. Being entirely retrospective, the study did not conduct any political analysis of the Ethiopian government, nor did it make any prognostication about the future prospects for Oromos in Ethiopia.

Petitioner also submitted an affidavit summarizing his life experiences both in Ethiopia and his academic and personal history in the United States. A.R. 32-34. The affidavit states that as a sympathizer of the Oromo people, Petitioner fears being labeled a member of the Oromo Liberation Front and persecuted as a result. Petitioner's affidavit details no instances of torture or physical abuse, but merely harassment, intimidation, and politically provocative interrogation. A.R. 33.

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[4] Given that Petitioner had lived in the Minneapolis/St. Paul area and apparently met the test subject criteria, A.R. 36, 464, it is possible that he could have been a test subject for the study. If he had, however, he would have been among the substantial percentage of Oromos who had *not* been tortured in the past. It is therefore puzzling what relevance the study has to the Petitioner, given the fact that he is not even within the group of persons whose experiences could arguably be material to his CAT claim.

Petitioner alleged that he was arrested, but offered no details of the arrest, detention, or criminal charges. Id. The affidavit alleges that the current Ethiopian government is still in power, but offers no details to establish materially changed country conditions.

Petitioner also submitted a letter of support from his church pastor and the local "Oromo Community" support organization, but neither of these offer any specific details to establish that country conditions had materially changed since Petitioner's initial hearing.

The Board denied the motion to reopen on June 16, 2005. A.R. 2. The Board noted that the motion to reopen was untimely and that it did not fit into any of the exceptions to the time limitations on motions to reopen. The Board observed that an application for asylum and withholding of removal could be reopened by an untimely motion to reopen based on changed country conditions, but observed that Petitioner's motion did not seek to reopen his application for asylum and withholding of removal. A.R. 3. Moreover, the Board observed that even if the controlling regulation, 8 C.F.R. § 1003.2(c)(3), did permit untimely motions to reopen for CAT relief based on changed country conditions, that Petitioner's submissions had failed to demonstrate that country conditions in Ethiopia had changed:

> The only evidence presented in conjunction with the respondent's motion that addresses country conditions within Ethiopia is the respondent's own affidavit, which states that the current government in Ethiopia is persecuting members of the Oromo Liberation Front, and a letter from the Executive Director of the Oromo Community of Minnesota, which indicates that the plight of the Oromo people in Ethiopia has worsened under the reign of Prime Minister Meles Zenawi. The Department of State country report contained within the prior record, however, indicates that Meles Zenawi was Prime Minister of Ethiopia at the time of the respondent's hearing before the Immigration Judge. ***See*** Exh. 7, ***Country Report on Human Rights Practices - 2000,*** Department of State Bureau of Democracy, Human Rights, and Labor (February 2001). The respondent has not provided any explanation as to how current conditions for Oromo in Ethiopia differ from those present at the time of his proceedings before the Immigration Judge. The respondent has therefore failed to present sufficient evidence of changed circumstances in Ethiopia. ***Id.***

A.R. 3.

The instant petition for review followed.

SUMMARY OF ARGUMENT

The Board was correct in denying the Petitioner's untimely motion to reopen. Even if such an untimely motion, based on changed country conditions, could be entertained by the Board in the context of an application for CAT relief, the Petitioner's motion failed to demonstrate that country conditions in Ethiopia had indeed changed since the last hearing. The evidence that Petitioner submitted did not address the political climate of Ethiopia, and it did not make any analysis

of the future plight of Oromos in Ethiopia. Being a purely medical demographic analysis, based on past events, it did nothing to establish that Petitioner would more likely than not be tortured in Ethiopia if he were removed to that country any time in the future. Given the fact that Petitioner himself had never been tortured in the past, the evidence he presented of past torture suffered by others was essentially immaterial to the Board's analysis of the likelihood of future torture. Thus, the Board did not abuse its discretion in denying the motion to reopen.

ARGUMENT

I. APPLICABLE LAW - GENERAL PRINCIPLES AND STANDARD OF REVIEW

This Court reviews BIA denials of both motions to reopen proceedings and motions for reconsideration, for abuse of discretion. Jalloh v. Gonzales, 423 F.3d 894 (8th Cir. 2005); INS v. Rios-Pineda, 471 U.S. 444, 449 (1985). The BIA's determination of purely legal questions regarding the requirements of the INA are reviewed de novo. Falaja v. Gonzales, 418 F.3d 889 (8th Cir. 2005) (The Court of Appeals reviews legal conclusions of the Board of Immigration Appeals (BIA) de novo, giving substantial deference to the BIA's interpretation of the immigration laws). However, motions to reopen are within the broad discretion of the Attorney General to deny. INS v. Doherty, 502 U.S. 314, 323 (1992); INS v. Abudu, 485

U.S. 94, 96 (1987); INS v. Rios-Pineda, 471 U.S. 444, 449 (1985). The Board may deny motions to reopen where an alien does not meet the regulatory requirements for reopening or fails to make out a prima facie case for the relief sought. INS v. Abudu, 485 U.S. 94 at 104-05 (1988). The Board may also deny motions to reopen on other independent discretionary grounds. INS v. Rios-Pineda, 471 U.S. at 446; Jalloh v. Gonzales, supra (The Attorney General is accorded considerable discretion in deciding whether to reopen or reconsider an asylum case, and the court reviews the denial of a motion to reopen for abuse of discretion.). As the Supreme Court has held, "[m]otions for reopening of deportation proceedings are disfavored for the same reasons as are petitions for rehearing, and motions for a new trial on the basis of newly discovered evidence." INS v. Doherty, 502 U.S. at 323, citing INS v. Abudu, 485 U.S. at 107-108. The reasons are clear: "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." INS v. Abudu, 485 U.S. at 107. If the Immigration Judge and the Board were not restrictive in granting motions to reopen, the system would be endlessly delayed "by aliens creative enough and fertile enough to continuously produce new and material facts

. . . ." INS v. Abudu, 485 U.S. at 108, quoting INS v. Jong Ha Wang, 450 U.S. 139, 144, n.5 (1981). Moreover, "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." INS v. Doherty, 502 U.S. at 323.

II. THE BOARD DID NOT ABUSE ITS DISCRETION IN DENYING THE PETITIONER'S MOTION TO REOPEN.

The applicable regulation, 8 C.F.R. § 1003.1(2004), governs motions to reopen. It states in part:

> A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted. . . A motion to reopen shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. . .

8 C.F.R. § 1003.1(c)(1). Timeliness of motion to reopen, based on changed country conditions, is addressed by 8 C.F.R. § 1003.23(b)(4)(1) (2004). It states:

> (4) Exceptions to filing deadlines -
>
> (i) Asylum and withholding of removal. The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and could not have been

discovered or presented in the previous proceeding.

As is stated above, The Board may deny motions to reopen where an alien does not meet the regulatory requirements for reopening or fails to make out a prima facie case for the relief sought. INS v. Abudu, 485 U.S. 94 at 104-05 (1988).

The materials Petitioner submitted in his motion to reopen do not establish prima facie eligibility for any of the relief he was seeking. The subject of the motion to reopen was to apply for relief under the CAT. An applicant for protection on the merits under the CAT bears the burden of establishing "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). For an act to constitute torture it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions. See 8 C.F.R. § 208.18(a); Matter of J-E-, 23 I. & N. Dec. 291, 296 (BIA 2002).

Thus, the burden of proof is entirely prospective; the successful applicant for relief under the CAT must show that torture is a likelihood in the future. To do so on a motion to reopen alleging changed country conditions, the successful applicant must show that country conditions have changed to make such an outcome likely in the future.

The materials that Petitioner submitted make no such showing. The article from the American Journal of Public Health about the prevalence of torture among Ethiopian refugees is based entirely upon past events, and is in any event immaterial to the Petitioner, insofar as he himself was never tortured. Moreover, the other documents Petitioner submitted are likewise irrelevant, insofar as they do not demonstrate that the political climate in Ethiopia had materially changed since Petitioner's last hearing. Petitioner's affidavit and letters of support allege "that the plight of the Oromo people in Ethiopia has grown from bad to worse under the reign of Prime Minister Meles Zenawi." A.R. 44. Even if that is true, it is nothing new and different from what was submitted to the Immigration Judge in Petitioner's removal hearing, which, as has been found, is insufficient to warrant a grant of relief.

Because the evidence presented in his first hearing does not, as a matter of law and *res judicata*, qualify the Petitioner for the CAT relief he is seeking, Petitioner was required to submit evidence to the effect that changed country conditions had made it more likely than not that Petitioner would be tortured upon return to Ethiopia. Petitioner's submissions fail in that regard. Thus, the Board did not abuse its discretion in denying the motion to reopen.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision and deny the instant petition for review.

Respectfully submitted,

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November 2, 2005

CERTIFICATION OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), and Eighth Circuit Rule 28A(c), I certify that Respondent's brief was prepared using Corel WordPerfect 12 and Times New Roman type in font size 14; is monospaced; has 10.5 or less characters per inch; and contains 524 lines of text.

_____

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CERTIFICATE OF VIRUS-FREE DISKETTE

I certify that, pursuant to Eighth Circuit Rule 28A(d), the enclosed 3 ½ inch computer diskette containing Respondent's Brief has been scanned for viruses and is virus free.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2005, I caused one copy of this BRIEF FOR RESPONDENT to be served on Petitioner's counsel by Federal Express overnight delivery, addressed to:

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